83-1385

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

RICHARD A. BROWN AND
CAROL BROWN, HIS WIFE,

PLAINTIFFS/PETITIONERS

V.

SKI ROUNDTOP, INC.
T/D/B/A SKI LIBERTY,

DEFENDANT

CERTIORARI FROM THE
THIRD CIRCUIT COURT OF APPEALS
CIVIL ACTION NO. 80-0403

PETITION FOR CERTIORARI

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PRELIMINARY MATTER

QUESTIONS PRESENTED

Did the Court of Appeals err in refusing to order a new trial when Plaintiffs' Due Process rights for full and fair hearing were violated by numerous trial errors to wit:

1. The refusal of the trial court to compel Defendant to disclose to Plaintiffs in discovery, information relevant to establishing Defendant's duty toward its business invitees. (The jury was only permitted to know of eleven [11] speed related accidents [only those where sled left track] when hundreds of speed related accidents had occurred. See A-6, line 10.)

2. The refusal of the trial court to allow Plaintiffs to cross-examine Defendant's manager in an area relevant to establishing Defendant's duty to its business invitees.

3. The refusal of the trial court, when Defendant had raised issues of comparative negligence repeatedly and inappropriately, to instruct the jury in accordance with Plaintiffs' point for charge number four which provided that the Plaintiff had no duty to foresee the negligence of another patron.

4. The refusal of the trial court to award Plaintiffs a new trial on the basis of newly discovered evidence of manufacturer's safety standards and Defendant's willful failure to apply them, which information was in the scope of prior discovery requests by Plaintiffs and had independent relevance in establishing Defendant's duty of care to Plaintiffs.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals below (Appendix. infra, pages A-27 to A-31) were not reported. The opinion of the District Court below (Appendix, infra, pages A-9 to A-26) was not reported.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the court below (Appendix infra, pages A-27 to A-24) was entered on October 31, 1983. A Petition for Rehearing

was filed on November 14, 1983. On November 28, 1983, the Court of Appeals denied Plaintiffs' Petition for Rehearing (Appendix, infra, pages A-30 to A-31). The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fifth Amendment of the United States Constitution which, in pertinent part, provides: "Nor shall any person ... be deprived of life, liberty, or property without due process of law; ..."

STATEMENT OF THE CASE

A. The basis of Plaintiffs' cause of action in negligence against Defendant.

In September of 1978, Plaintiff, Carol Brown. became a patron of Defendant's Alpine slide. An Alpine slide consists of a concrete chute on which "sleds" with wheels travel down a mountainside. It was Mrs. Brown's first time on such a slide, but she was given no instructions by Defendant or its employees.

In the upper third of the slide, Plaintiff was rear ended by another patron traveling at a high rate of speed and suffered severe and permanent back injuries as a result of the collison.

Plaintiffs brought suit in the United States District Court for the Middle District of Pennsylvania on the basis of amount in controversy and diversity of citizenship. The Court properly applied Pennsylvania law.

Pennsylvania has adopted the Restatement Second of Torts §344 in defining the duty of amusement operators toward their patrons. It provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons or animals and by the failure of the possessor to excercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a

> warning adequate to enable visitors to avoid the harm or otherwise to protect them against it.

Moran v. Valley Forge Drive-In Theatre, Inc., 431 Pa. 432, 246 A.2d 875 (1968). Where the amusement operator defendant's "past experience is such that he should reasonably anticipate careless or criminal conduct on the part of third persons,..., he may be under a duty to take precautions against it." Comment f to the Restatement of Torts Second §344, Sims v. Strand Theatre. 150 Pa. Super. Ct 627, 29 A.2d 209 (1942).

B. The trial court's errors.

In an effort to demonstrate to the jury Defendant's duty toward Plaintiff as a patron of its amusement operation and Defendant's breach of that duty, Plaintiff sought through discovery to learn Defendant's past experience with injuries to its patrons which, like the injury to Plaintiff, were caused by excessive speed of other patrons on the amusement. The

lower court refused to permit Plaintiffs to discover this information and instead limited its Order compelling discovery to directing Defendant to disclose those accidents which, unlike the accident in which Plaintiff was injured, involved sleds leaving the runway. See Appendix, page A-2, A-16 to A-18.

Since Plaintiff's sled did not leave the runway at the time she was injured, there was no rational basis for the court to so limit discovery. This arbitrary limitation deprived Plaintiffs of the ability to demonstrate to the jury that Defendant had reason to anticipate and to safeguard against the careless conduct which caused Plaintiff's injury. Such arbitrary decisions violate due process.

At trial Plaintiffs again attempted to reveal to the jury the information regarding the past history of accidents on the slide through cross-examination of Defendant's manager. Again, the court limited Plaintiffs' cross-examination of the manager to those

injuries which occurred when, unlike in Plaintiffs' case, the sled left the runway. See Appendix, page A-5 to A-6, A-16 to A-18. This was a second arbitrary ruling without rational basis which deprived the jury of the opportunity to assess the merits of Plaintiffs' case and deprived Plaintiffs of due process.

These rulings were contrary to a decision of the Third Circuit Court of Appeals in Josephs v. Harris Corp., 677 F.2d 985 (3rd Cir. 1982). In Josephs, the Third Circuit expressly held that plaintiff was entitled to discover the names of all persons injured by defendant's product because such information could lead to relevant evidence regarding the defendant's knowledge of a defect. Similarly, under the law applicable to amusement operations, Defendant's past experience was focal to establishing its knowledge of the hazards of its operations and its duty of care to Plaintiff as a business invitee. These erro-

neous rulings on discovery matters deprived Plaintiffs of their due process rights by severely prejudicing their opportunity to be heard. Societe Internationalle Pour Participations Industrielles et Comerciales S.A. v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958).

Further, the trial court thwarted Plaintiffs' efforts to define to the jury the difference between Defendant's duty as an amusement operator (i.e. to discover dangers to its patrons caused by third parties and to protect against such dangers. See pages 3-4, supra) and Plaintiff, as a patron (i.e. no duty to anticipate the negligence of another. Gregorius v. Safeway Steel Scaffolds Co., 409 Pa. 578 (1963). Although Defendant repeatedly suggested an issue of comparative fault, the Court refused Plaintiffs' requested charge regarding Plaintiff's duty of care. See Appendix, page A-3, A-4, A-18 to A-20.

C. The newly discovered evidence.

After the close of the trial in which the above-mentioned errors were made, Plaintiffs discovered pertinent manufacturer's standards for the safe operation of the Alpine slide which set minimum guidelines for Defendant's duty to take precautions. The newly discovered evidence also established that these minimum standards had been provided to Defendant and that receipt of this information had been acknowledged in writing by managerial employees of Defendant prior to the incident in which Plaintiff was injured.

Plaintiffs, during discovery, had requested all manufacturer's information from Defendant and Defendant had failed to provide the manufacturer's manual which set forth the minimum safety standards applicable to operation of the amusement. The evidence at trial when compared to these new safety standards, demonstrated that Defendant failed to take even minimum precautions to protect its

patrons including Plaintiff, from the foreseeable hazards of its operation.

As a result of Defendant's failure to fulfill its corporate duties in discovery, the jury did not know that Alpine Slide recommended the foregoing safety measures as minimum precautions. See Trial Court's opinion, Appendix, page A-22 to A-23. Since industry standards have independent relevance in establishing a standard of care in the industry, Norton v. Railway Express Agency Inc , 412 F.2d 112 (3rd Cir. 1969), George v Morgan Construction Company, 389 F. Supp. 253 (E.D. Pa. 1975), withholding the information from the jury compromised its ability to fully and fairly hear the case and violated Plaintiffs' due process rights.

As a result of Defendant's failure to fulfill its corporate duties during discovery, the jury did not know that the manufacturer had recommended safety measures as minimum

precaution which Defendant had failed to apply. See Appendix, page A-22 to A-23. Nevertheless, the trial court refused Plaintiffs' motion for a new trial based on this relevant newly discovered evidence. See Appendix, page A-22 to A-26. As a result of the unreasonable and arbitrary limitation imposed by the trial court on discovery and cross-examination, the jury did not know that Defendant had past experience with speed related accidents on the slide which gave it a duty to protect patrons against third parties traveling too fast on the slide.

The constitutional requirement of Due Process protects a litigant from arbitrary action by the tribunal in its hearing of a civil matter. Washington ex. rel. Oregon R. & N. Co. v. Fairchild, 224 U.S. 510, 32 S. Ct. 535, 556 L. Ed. 863 (1912). When arbitrary conduct on the part of the trial court impairs the fundamental right of cross-examination

this also is a denial of due process of law. Smith v. Smith, 270 P. 2d 613, 125 Cal. App. 2d 154 (1954).

As previously stated by this Honorable Court, "In almost every setting where important decisions turn on questions of fact, Due Process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269, 25 L. Ed.2d 287, 90 S. Ct. 1011 (1970). In the instant case, the trial court by its arbitrary and unreasonable rulings on discovery and cross-examination deprived Plaintiffs of the opportunity to confront Defendant with industry safety standards and its breach thereof and with the history of injuries on Defendant's amusement facility which gave rise to Defendant's duty to protect Plaintiff from the hazard which caused her injury.

EXISTENCE OF JURISDICTION IN THE COURTS BELOW

Jurisdiction of the District Court to hear the instant case was based upon amount in

controversy and diversity of citizenship pursuant to 28 U.S.C. §1332(a)(1). The matter was heard in the United States Court of Appeals for the Third Circuit as a final judgment of the District Court in accordance with 28 U.S.C. §1291.

REASONS FOR THE WRIT

The Third Circuit Court of Appeals in sanctioning Defendant's failure to fulfill its discovery duties in regard to the manufacturer's suggested minimum safety standards has rendered a decision in conflict with the decision of the First Circuit Court of Appeals in Krock v. Electric Motor and Repair Co., 339 F.2d 73 (1st Cir. 1964), and has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings by accepting arbitrary and unreasonable rulings by the District Court, which limited discovery and cross-examination regarding the history of prior accidents on Defendant's amusement facility to

those, which were dissimilar to that accident in which Plaintiff was injured, and refused discovery or cross examination regarding accidents similar to that in which Plaintiff was injured, as to call for an exercise of this Court's power of supervision.

The trial court's arbitrary rulings, accepted by the Court of Appeals, are contrary to the purpose of discovery and violative of Plaintiffs' right to Due Process. By permitting Defendant to withhold in discovery applicable safety standards, by arbitrarily limiting Plaintiffs' discovery and cross-examination rights re: prior injuries at Defendant's facility, and by refusing to instruct the jury so as to contrast the duty of Plaintiff to that of Defendant to protect against foreseeable hazards the trial court deprived Plaintiffs of the right to prove their cause of action under applicable law.

CONCLUSION

Petitioners respectfully request this Honorable Court to grant certiorari from the judgment of the Court of Appeals.

Respectfully submitted,

LAUCKS & MONROE

By: Donald L. Reihart
Donald L. Reihart
Attorney for Richard A. Brown and Carol Brown, his wife

APPENDIX

Contents of the Appendix include:

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD A. BROWN and CAROL A. BROWN, his wife, Plaintiffs	:	
v.	:	Civil Action No. 80-0403
SKI ROUNDTOP, INC. t/d/b/a SKI LIBERTY, Defendants	:	

ORDER

IT IS HEREBY ORDERED:

1. Jury selection in the captioned action is scheduled to begin at 9:30 a.m. on April 5, 1981 in Courtroom No. 2, Ninth Floor, Federal Building, Third and Walnut Streets, Harrisburg, Pennsylvania.

2. Trial in this matter will begin immediately after jury selection is completed.

3. Defendant shall supply to plaintiff a summary of all accidents not previously supplied to plaintiff which occurred at the Alpine Slide at Ski Liberty between June 5, 1977 and September 4, 1978, which involved sleds leaving the runway. The court has

construed the remarks made by plaintiffs' counsel at the pre-trial conference on March 26, 1982 on the issue as an oral motion to compel. Based upon the oral discussion at the pre-trial conference, the court determines that plaintiff should receive the material specified above.

/S/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: March 30, 1982

On Number Four, I really feel since I have taken away the assumption of the risk and contributory negligence from the jury, that there is no need to give that Charge

My only concern would be if Mr. Emory in his closing mentions that she should have been aware or should have looked after the sled coming behind her or something like that. In which event, I may have to put it back in.

MR. EMORY: I will certainly try to keep that out.

Finally, are you going to give No. 4?

THE COURT: No, he didn't say anything. It wasn't brought to my attention. I said I wasn't going to give it unless he made a reference to her foreseeing or protecting her against the sled behind her.

MR. REIHART: In his argument, he did refer to the fact that she didn't read the signs. I thought that was sufficient to trigger the instruction.

THE COURT: No.

Q Were there other reported injuries that dealt with injuries where while the sled did not leave the track, speed and speed alone was the cause of the injury?

MR. EMORY: Objection. Your Honor.

THE COURT: Sustained.

BY MR. REIHART:

Q Were there injuries reported to you where people came off the sled?

MR. EMORY: Objection, Your Honor. I think it is improper for Mr. Reihart to continue this line of questioning. Rulings have already been made on this subject. I think it is highly improper.

THE COURT: Approach the Bench.

(The following discussion was held at sidebar:)

THE COURT: I think Mr. Emory is referring to my ruling that I made insofar as your discovery is concerned. I permitted you to have reports of rear-end collisions and any

additional reports on sleds that left the track because I didn't think that anything else was relevant. So you are getting into an area of other injuries.

What is the relevance of someone who falls off the slide without the sled leaving the track?

MR. REIHART: What I heard Mr. Emory saying in his opening statement was that there were 160,000 trips down this slide, and that there were only ten injury-producing rear-end collisions, and only eleven injuries that were resulting from sleds going off the track indicating that this really wasn't a very dangerous operation.

If injuries are the measure of the danger of the operation and he is going to make that kind of an argument, I think that the jury is entitled to know all the injuries that occurred on the slide that came from the movement of the sled.

THE COURT: Mr. Emory?

MR. EMORY: I don't think it is relevant, Your Honor, if somebody puts their arm out, it doesn't matter how fast they are going. If they scrape it across concrete, they are going to scrape their arm.

Speed, I dont' think, is necessarily or even a function of that at all. It may be in some instances, but no necessarily.

THE COURT: I certainly think the speed is relevant to a sled leaving the track, but I am going to sustain the objection.

(End of discussion at sidebar.)

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD A. BROWN and CAROL A. BROWN, Plaintiffs	:	
v.	:	Civil Action File No. 80-0403
SKI ROUND TOP t/d/b/a SKI LIBERTY, Defendant	:	JUDGMENT

This action came on for trial before the Court and a jury. Honorable Sylvia H. Rambo, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that judgment be and hereby is entered in favor of the defendant, Ski Round Top t/d/b/a Ski Liberty, and against the plaintiffs, Richard A. Brown and Carol A. Brown.

Dated at Harrisburg, Pennsylvania, this 7th day of April, 1982

DONALD R. BERRY, CLERK

/S/ Terry J. Kapp
Deputy Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD A. BROWN and CAROL A. BROWN, his wife.	:	
Plaintiffs	:	
v.	:	Civil Action No. 80-0403
SKI ROUNDTOP, INC. t/d/b/a SKI LIBERTY,	:	
Defendants	:	

MEMORANDUM

Plaintiffs, who were unsuccessful in a personal injury suit tried before a jury. have filed a motion for a judgment non obstante veredicto pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, and a motion for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. Plaintiffs also filed a supplemental post-trial motion for a new trial pursuant to Rule 59(d) of the Federal Rules of Civil Procedure and a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure

on the ground of newly discovered evidence. For the reasons which follow, the court will deny plaintiffs' motions.

I. Motion for Judgment N.O.V.

Plaintiffs state in their brief that they moved for a directed verdict at the close of all the evidence which motion was denied by the court (Doc. #44, p. 6). In the absence of a transcript the court reporter was asked to review her notes and advise the court if plaintiffs' counsel made a motion for a directed verdict. A review of the reporter's notes reveals that at the conclusion of the testimony defense counsel renewed his motion for a directed verdict but no motion was made by plaintiffs' counsel.

Rule 50(b) of the Federal Rules of Civil Procedure states that "Whenever a motion for a directed verdict made at the close of all the evidence is denied...Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the

verdict and any judgment entered thereon set aside..." (emphasis added). Plaintiffs have failed to comply with Rule 50(b) and therefore are not entitled to file a motion for judgment N.O.V. at this juncture. Lowenstein v. Pepsi Cola Bottling Co of Pennsauken, 536 F.2s 9 (3d Cir.) cert. denied 429 U.S. 966 (1976).

It is not clear whether plaintiffs are asserting that their point for charge #1 in the nature of a binding instruction was in fact a motion for directed verdict.[1] The court did not treat plaintiffs' point #1 as a motion for a directed verdict and the parties did not argue it as such a motion. The point was denied. In Lowenstein, the Third Circuit stated

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[1] The requested jury instruction read: "Under all the evidence, pleadings and law of this case, the verdict must be for the Plaintiff and against the Defendant."

> [I]t is clear that a request for such [binding] instructions which the district court neither treated nor ruled upon as it would treat with or rule upon a motion for directed verdict... will not be considered by this Court as satisfying the necessary predicate for a judgment N.O.V. (citations omitted). Id. at p. 11.

It would thus appear that procedurally plaintiffs are not entitled to consideration of their motion for judgment N.O.V.

Assuming that plaintiffs' motion for judgment N.O.V. is properly before the court, it lacks merit. The standard in passing on such a motion is the same as the standard used to evaluate motions for directed verdicts. Neville Chemical Co. v. Union Carbide Corporation, 422 F.2d 1205, 1210 (3d Cir.) cert denied, 400 U.S. 826 (1970). The established rule requires the trial court to view the evidence in the light most favorable to the party against whom the motion is made. Onufer v. Seven Springs Farm, Inc., 636 F 2d 46, 47 (3d Cir. 1980). See also Patzig v.

O'Neil, 577 F.2d 841, 846 (3d Cir. 1978): "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party", citing 9 C. Wright & A. Miller, Federal Practice & Procedure, §2524 at 542-43 (1971). The issue for the jury in the case sub judice was whether or not defendant operated its amusement in accordance with the standards of Section 344 of Restatement (Second) of Torts §344 (1965). In arguing the §344 issue, the parties focused on the following sub issues:

1. whether defendant adequately cautioned sled riders on speed either verbally or by posted signs:
2. whether an adequate number of employees were stationed at the start of the slide:
3. whether there should have been a roving slide patrol:

4. whether there were adequate time intervals between starting each sledder

5. whether defendant made adequate investigations of other accidents.

Based upon the testimony presented and the inferences to be drawn therefrom upon these sub issues, there were clearly conflicting facts that had to be resolved by the jury. In light of the conflicting evidence on the above issues the court concludes that plaintiffs, who had the burden of proof on §344, have failed to show that "[T]he overwhelming preponderant proof is so in favor of the movant as to permit no other rational conclusion" such that the motion should be granted. Wells v. Connecticut General Life Insurance Co., 469 F.2d 1231, 1234 (10th Cir. 1973) cited in Fireman's Fund Ins. Co v. Videfreeze Corp., 540 F.2d 1171, 1177 (3d Cir. 1976) cert. denied, 429 U.S. 1053 (1976). Plaintiffs' motion for a judgment N.O.V. will be denied.

II. Motion for New Trial Because the Verdict was Against the Weight of the Evidence and Because Trial Errors Prejudiced Plaintiffs' Rights.

A. Plaintiffs have moved for a new trial on the grounds that the verdict was against the weight of the evidence Plaintiffs claim that under the applicable law defendant had a duty to discovery the hazards of speed related accidents, to warn plaintiff Carol Brown of those hazards and to take reasonable steps to prevent injury to the plaintiff. The plaintiffs claim that the testimony was uncontradicted and established that defendant breached its duty to plaintiff.

On the contrary, there was testimony that defendant was aware of prior speed related accidents on the slide: defendant knew that such accidents were caused by the uphill sled traveling faster than the downhill sled; defendant made efforts to instruct patrons on sled operation; defendant posted warning signs on speed and handling of sleds. The testimony

at trial was contradictory as to whether defendant violated the reasonable care standard in the operation of its facility. The court concludes that there was sufficient evidence to support the verdict.

B. Plaintiffs further allege as grounds for a new trial that the court committed the following trial errors:

1. the court refused to compel defendant to provide to plaintiff accident reports for all speed related accidents between June 1977 and September 4, 1978;
2. the court refused to permit plaintiffs to cross examine the defendant's manager on the number of speed related accidents which occurred prior to plaintiff Carol Brown's accident:
3. the court refused to instruct the jury on plaintiffs' requested point for charge No. 4.

The court will address the first two grounds together. To begin plaintiffs were furnished with reports of ten rear end accidents that occurred prior to the accident in this case. Plaintiff also received information on ten or eleven other accidents in which the sled may have left the track and resulted in injury to the sledder. The court declined to force defendant to disclose information for all speed related accidents that occurred prior to Carol Brown's accident. It also limited cross examination of defendant's manager on the same issue. The basis for these rulings was the court's conclusion that the information on all speed related cases was not relevant to the issues involved in the case. The irrelevant issues concerned whether defendant breached its duty to plaintiff or failed to act in a reasonable manner in terms of alterting instructing and preventing sledders from rear-ending each other. Defendant

neither denied knowledge of past rear end collisions, nor denied that it had a duty to try to prevent such accidents. Thus the court saw no need to allow discovery or cross examination of all speed related accidents. Furthermore, the term "speed related" was too general. Presumably all accidents on the slide could be related to speed. To place into evidence each and every accident that happened would have served no useful purpose.

Plaintiffs contend that the court erred in refusing to give their point for charge No. 4. Plaintiffs' point for charge No. 4 stated "Plaintiff Carol Brown had no duty to foresee that she would be struck in the rear by another rider." (Citation omitted) The court previously ruled that based upon the facts of this case, assumption of risk and comparative negligence were not issues in this case. To have given plaintiffs' instruction #4 would have injected issues into the case that were not present. Plaintiffs argue,

however, that defendant's closing argument alluded to contributory negligence and assumption of risk and therefore the instruction was required. The court disagrees. Defendant's closing argument must be considered in the context of plaintiffs' closing argument. Plaintiffs' closing made repeated references to lack of warnings and signs concerning sled operation and the risk of rear end collision. The defendant did not argue in closing the theories of assumption of risk or contributory negligence. Instead, defense counsel focused on the same theories presented throughout the trial: defendant met the standard of reasonable care imposed by the Restatement (Second) of Torts §344 by properly warning sledders about the operation of their sleds in order to prevent rear end accidents. A review of the court's charge shows that the jury's duty with

regard to liability was solely to determine whether defendant breached its duty under Section 344.[2]

III. Supplemental Motion for a New Trial

Plaintiff filed a supplemental motion for a new trial alleging the discovery of new evidence. The "newly discovered evidence" consisted of correspondence between defendant and Alpine Slide Corporation, manufacturer of the Alpine Slide involved in this case, and two editions of an operations manual published by Alpine Slide Corporation and delivered to defendant prior to Carol Brown's injury. The manuals set forth minimum standards for the safe operation of an alpine slide.

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[2] Plaintiffs also alleged in their motion for a new trial that the court, in essence, charged the jury in terms of complicated legal principles rather than in simple language. Plaintiffs did not brief this issue. The court finds no error in the language used to instruct the jury.

Both parties agree that the standard for the grant of a new trial based on newly discovered evidence under either Rule 59 or 60 of the Federal Rules of Civil Procedure is as follows:

1. the evidence must in fact be discovered since the trial;

2. that due diligence is shown by the moving party;

3. the evidence must not be merely cumulative or impeaching

4. the evidence must be material;

5. the evidence must be of such a nature that a new trial would probably produce a new result.

See, Giordano v. McCartney, 385 F.2d 154 155 (3d Cir. 1967).

The court will focus its discussion on whether the evidence is cumulative. The newly discovered operations manuals set forth minimum standards for the safe operation of an alpine slide and require an alpine slide operator, such as defendant, to:

1. Caution customers at the start of the slide not to go too fast or bump into anyone in front of them.

2. Employ either a slide instructor and a separate slid starter, or in the alternative, to employ two slide instructor/starters, one for each track, at the start of the alpine slide.

3. Employ, at busy times, two or more slide patrol employees to walk along the slide and ask customers to slow down or not to bump other customers.

4. Employ at least 15 employees in slide operation at full capacity periods including a slide instructor and a slide starter and two or more slide patrol personnel.

5. Time the intervals between starting patrons.

Nothing set forth in the manuals themselves constituted information or evidence not already presented at trial. Each of the five standards were issues in the trial and were vigorously argued. Defendant's witness testified that Ski Liberty either had in current operation or had tried and rejected various safety precautions. The testimony covered all of the safety measures set forth in the manuals. Thus, although the jury did not know that Alpine Slide recommended the

foregoing safety measures as minimum precautions. the jury was presented with a thorough discussion about the need for and practicality of employing each of the recommendations. Furthermore, the jury did not know that the manuals stated that variations may be expedient at various sites. Nevertheless, the jury was presented with the rationale underlying such a statement. In light of the thorough discussion given to the underlying basis for Alpine Slide's recommendations, the court concludes that the manuals constitute cumulative material, and are not of such a nature that a new trial would produce a different result.

Plaintiffs' motion under Rule 59(d) of the Federal Rules of Civil Procedure will be denied. For the foregoing reasons, the court

will also deny plaintiffs' motion for relief from judgment filed pursuant to Rule 60 of the Federal Rules of Civil Procedure.

/S/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: January 28, 1983

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD A. BROWN and CAROL A. BROWN. his wife Plaintiffs	:	
v.	:	Civil Action No. 80-0403
SKI ROUNDTOP, INC. t/d/b/a SKI LIBERTY, Defendants	:	

ORDER

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' motion for a judgment n.o.v. pursuant to Federal Rule of Civil Procedure 50(b) is denied for the reasons set forth in the accompanying memorandum.

2. Plaintiffs' motion for a new trial pursuant to Federal Rule of Civil Procedure 59(a) is denied for the reasons set forth in the accompanying memorandum.

3. Plaintiffs' motion for a new trial pursuant to Federal Rule of Civil Procedure 59(d) is denied for the reasons set forth in the accompany memorandum.

4. Plaintiffs' motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) is denied for the reasons set forth in the accompanying memorandum.

/S/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: January 28, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3113

RICHARD A. BROWN and
CAROL A. BROWN, his wife

v.

SKI ROUNDTOP, INC. t/d/b/a
SKI LIBERTY

Richard Brown and Carol Brown,
Appellants

(D.C. Civil No. 80-403)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

Hon. Sylvia H. Rambo, District Judge

Submitted Under Third Circuit Rule 12(6)
October 27, 1983
Before: GIBBONS, GARTH, HIGGINBOTHAM

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JUDGMENT ORDER

Richard A. Brown and Carol A. Brown appeal from an order denying their motion for a new trial following a jury verdict in favor of the defendant Ski Roundtop, Inc. in their action for damages for the personal injury of Mrs. Brown. They contend that the court erred in failing to grant a new trial:

(1) on the basis of newly discovered evidence;

(2) because discovery had been improperly limited;

(3) because of the court's refusal to give a charge consistent with their request to charge No. 4;

(4) because the verdict is against the weight of the evidence.

We find no merit in these contentions.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs are taxed in favor of appellee.

BY THE COURT,

/S/ John J. Gibbons
Circuit Judge

Attest:

/S/ Sally Mrvos
Sally Mrvos, Clerk

Dated: Oct. 31, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3113

RICHARD A. BROWN and
CAROL A. BROWN. his wife

v.

SKI ROUNDTOP, INC. t/d/b/a
SKI LIBERTY

Richard Brown and Carol Brown,
Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS. GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT.

/S/ John J. Gibbons
Judge

Dated: November 28, 1983